IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

JOSEPH W. DI SILVESTRO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH W. DI SILVESTRO
41-11 12th Street
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Attorney for the Petitioner.

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Joseph W. Di Silvestro, Appellant below, prays, that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 15, 1960, at (A-16) and the judgment of the said Court dated June 10, 1960, to wit:

> "MOTION FOR LEAVE TO DISPENSE WITH PRINTING OF BRIEF AND APPENDIX; MOTION FOR PREFERENCE FOR AN EARLY HEARING OF THE APPEAL.
>
> Motion denied.
>
> The order is affirmed on the opinion of Judge Rayfiel.
>
> J. E. LUMBARD
> C. E. CLARK
> H. J. FRIENDLY
> U. S. C. JJ."

Opinion Below

The United States Court of Appeals for the Second Circuit affirmed the order on opinion of Judge Rayfiel at (A-12), has not yet been printed in the Federal Reporter.

Jurisdiction

The final judgment of the United States Court of Appeals for the Second Circuit was entered on June 15, 1960. This petition for certiorari is filed within ninety days thereafter in accordance with the provisions of Title 28 U. S. C. 2101(c).

Questions Involved

1. Whether the petitioner, an honorably discharged war veteran, having a war service-connected disability, rights to medical and hospital care and treatment under Executive Order No. 6566, Veterans' Regulation No. 6, have been violated?
2. Whether petitioner's guarantees to the due process of law under the First and Fifth Amendments of the Constitution of the United States have been violated by judgment of the lower federal courts, precluding judicial review and the right to maintain an action under the Federal Tort Claims Act, for the negligent treatment of petitioner's war service-connected disability?

Statutes Involved

The President of the United States said:

"NOW THEREFORE, by virtue of authority vested in me by . . . law the following regulation is promulgated:

"I. The . . . Veterans' Administration . . . is authorized to furnish to honorably discharged war veterans of any war . . . domiciliary or hospital care, including medical treatment, *to the following persons in the specified order of preference:*

(a) to veterans who are suffering with injuries or diseases which were incurred or aggravated in line of duty in the Military or Naval service *when in need of hospital treatment for such injuries or diseases.*" *Executive Order No. 6566, Veterans' Regulation No. 6,* section 6 Public Law 2, 73d Congress (706 U. S. C. A. 38). (Italics added.)

* * * *

Section 1346(b) Title 28 U. S. C. (Federal Tort Claims Act) provides in the relevant part, to wit:

"the United States District Court wherein the plaintiff is a resident . . . sitting without a jury . . . shall have exclusive jurisdiction to hear, determine, *and render judgment on any claim against the United States for money* . . . on account of damage to or loss of property or on account of *personal injury* . . . caused by the negligence or wrongful act or omission of any employee of the Government while acting

within the scope of his office or employment, under circumstances, where the United States, if a private person would be liable to the claimant for such damage, loss, injury . . . in accordance with the law where the act or omission occurred." (Italics added.) (New Title 38, U. S. C. A., effective 1960, is not applicable in the case at bar.)

Statement of the Case

On September 30, 1959, the Honorable United States District Judge Matthew Abruzzo, by evidence adduced by the court in 1948, found the petitioner to have an already adjudicated award of compensation (A-3). Under this award the petitioner was included in the class of disabled war veterans in the "Specified Order of Preference Under Class '(a)' of Executive Order No. 6566, Veterans Regulation No. 6," that created a right to the petitioner to be furnished with *medical, domiciliary* and *hospital* care and treatment by the Veterans Administration, *for the protection of petitioner's war disability.* Under these circumstances, Judge Abruzzo placed the petitioner on September 30, 1959 in the custody of the Court and directed the petitioner to enter a VA hospital for treatment and care. See filed transcript of record page 37 of Proceedings in the United States Court of Appeals. Under the supervision of the said court the sick and ailing petitioner applied for hospital admission and was denied medical aid and hospitalization by a forfeiture order of the Board of Veterans Appeals at (A-5), that was retroactively applied against an already adjudicated award to such disability rights. Thereafter the petitioner resorted

to Doctor Harry G. Golan for medical treatment. Doctor Harry G. Golan found the petitioner's war disability greatly exacerbated and prescribed "nitroglycerine pills" to lessen petitioner's mental and physical pains (A-6). As a result of the said Board's action the VA and its officials have failed to protect the petitioner from *the type of harm which in fact occurred* (A-3, A-4, A-5, A-6, A-7, A-8 to A-11).

Now in the case at bar, Judge Rayfiel of the District Court has precluded judicial review and has precluded to maintain judicial jurisdiction to review the acts of the public officials of the Veterans Administration, who have retroactively applied a fraud statute, under *Section 15, Public Law 2, 73d Congress,* forfeiting petitioner's rights that have already been adjudicated to the benefits under *Executive Order No. 6566,* that requires the VA to furnish the petitioner with medical and hospital care and treatment for his war service-connected disability. The United States Court of Appeals for the Second Circuit affirmed the opinion of Judge Rayfiel at (A-12 to A-15).

The petitioner asserts that the lower courts erred and failed to hold that the violation of petitioner's rights to medical and hospital treatment and care under Executive Order No. 6566, Veterans Regulation No. 6, is *negligence per se.*

The petitioner asserts the wrongful acts and omissions of the Administrator's Board of Veterans' Appeals, as public officials, had no authority to forfeit petitioner's already adjudicated rights, and that such wrongful acts and omissions of said Board of Veterans' Appeals are a wilful violation of federal law, regulations and executive orders.

The petitioner further asserts that the negligent treatment of his service-connected disability, by refusal of the VA to hospitalize petitioner on September 30, 1960, sustains his cause of action under his complaint filed in the lower court's record at pages 1 to 7, and sustains his right to sue the United States under Section 1346(b) of Title 28, U. S. Code, for damages for personal injuries, and sustains his guarantees to judicial review and redress of his grievances in the District Court.

• Specifications of Errors to Be Urged

That the petitioner will urge that the lower courts erred in opinion that concluded Judicial Review and foreclosed a trial of the issues on the merits of the complaint and the answer. That the lower courts erred in upholding a summary judgment to deny judicial review of the pleadings, *without a hearing* or *determination* of Respondent's unverified *answer*, that denied irrefutable *evidence* in support of the *complaint*, arising out of causes of action for negligence, wrongful acts and omissions in violation of *Executive Order No. 6566*. That the lower courts erred contrary to law and fact, in opinion, concluding without a judicial review that petitioner *seeks "pension" disability benefits*. That the lower courts have erred and failed to decide that petitioner's benefits flow from *compensation disability* for a war *service-connected disability*, within the purview of *the preference class "(a)"* of *Executive Order No. 6566*, that placed and includes the petitioner under the protection of *medical* and *hospital* care and treatment, inviolate. That *pension* disability benefits are not included *with*

service-connected disability and that the opinions of the courts below are baseless and that the Circuit Court below, in affirming preclusion of judicial review, is in violation of petitioner's right to maintain an action under the Federal Tort Claims Act for the negligent treatment of petitioner's war service-connected disability.

Reasons for Granting the Writ

The petitioner asserts that a writ of certiorari should be granted under subdivision (b) of Part V of Rule 19 of this Court, in that the District Court and the United States Court of Appeals for the Second Circuit have rendered a decision in conflict with the Constitution of the United States and with the decisions of the United States Court of Appeals for the District of Columbia, and in conflict with applicable decisions of this Court, and that the lower courts have so far departed from the accepted judicial proceedings as to call for an exercise of the Court's power of supervision.

This case, while it involves petitioner's individual and constitutional rights and guarantees, is very important because here Congress has created a statutory duty imposed by law holding RESPONSIBLE any federal agency or employee of the Government to a minimum requirement of the exercise of "Due Care", to wit:

> "The exercise of due care is 'required' upon any statute or regulation *whether or not such statute or regulation be valid or invalid*, or based upon the exercise or perform a discretionary function or duty on the part of a federal agency or an

employee of the Government, whether or not the discretion involved is abused." *Section 2680(a) of Title 28 U. S. Code* (Federal Tort Claims Act).

To hold any federal agency or Government employees immune from judicial review of their negligence or unanswerable for the wrongful acts and omissions particularly in the case at bar for the negligent treatment of petitioner's war service-connected disability then we have created an autocracy, then the Constitution of the United States, Acts of Congress of the United States and Executive Orders of the President of the United States created to protect disabled war veterans from the type of harm which in fact has occurred in the case at bar *are entirely worthless.*

It is well established that "violations of statutes constitute *negligence per se.*" See: *Mitchel, J.*, in *Osborne* v. *McMasters*, 1899, 40 Minn. 103, 105, 41 N. W. 543, 544, 12 Am. St. Rep. 698.

"Where a ministerial duty obviously imposed for the benefit of a particular class of persons, one within that class may found an action on the statute." *Howley* v. *Scott*, § 913, 123 Minn. 159, 145 N. W. 257, 51 L. R. A., N. S. 137.

"The same limitation of the effect of the statute to accomplish only the supposed policy of the legislature is found in the requirement of the harm suffered must be of the kind which the statute intended, in general to prevent." See: *Thayer, Public Wrong and Private Action*, 1914, 27 Harv. L. Rev. 317, 325.

Judge Cardozo held:

> "Where the statute is interpreted as intended to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred, *the weight of authority holds that an unexcused violation is negligence in itself* and the court must so charge the jury." *Cardozo, J.*, in *Martin* v. *Herzog*, 1920, 228 N. Y. 164 N. E. 814; *Larkins* v. *Kohlmeyer*, 1951, 229 Ind. 391, 98 N. E. 896; *Schell* v. *DuBois*, 1916, 94 Ohio St. 93, 113 N. W. 664 L. R. A. 1917A, 710; *Anais* v. *Britton*, 232 Mich. 241, 205 N. W. 128.

The courts below entirely ignored petitioner's right to sue for "negligence" under Section 1346(b) U. S. C. 28. Here the lower courts entirely ignored the ruling of Judge Cardozo, that must be equally applicable to district courts when sitting without a jury. Here the lower courts entirely ignored the Board of Veterans' Appeals' unexcused violation of petitioner's rights under the law of *Executive Order No. 6566, Veterans Regulation No. 6.* Here, the courts below erred in basing their opinions upon a conclusion that petitioner is seeking "to obtain a review of the decision of the Veterans' Administration which forfeited his *pension* and disability benefits" at (A-12). The petitioner is not asking for any such review. The petitioner is simply suing for damages of *forfeiture action* of the Board of Veterans' Appeals' negligence and unexcused violation of the petitioner's *compensation disability benefits* that have been already adjudicated and awarded to him, not in a *pension* classification which is defined as *non-service-connected disability*—but for a *service-connected disability* de-

fined as "Compensation Disability" by Section 700 U. S. C. A. 38, and within the purview of Executive Order No. 6566, Veterans' Regulation No. 6, to wit:

> "I. The Veterans Administration is authorized to furnish to honorably discharged veterans of any war . . . domiciliary, or hospital care, including medical treatment, *to the following persons in the specified order of preference:*
>
> (a) to veterans who are suffering with injuries incurred or aggravated in line of duty in the Military or Naval service" (A-3, A-4). (Italics added.)

The above is a property right vested in the petitioner and forfeited by the Board of Veterans' Appeals at (A-5) in violation of the due process of law and violative of petitioner's guarantee to petition the Government for redress of his grievances. Executive Order No. 6566 must be held mandatory and binding upon the Veterans' Administration's Board of Veterans' Appeals as public officials and employees of the United States Government to preserve inviolate petitioner's guarantees under the First and Fifth Amendments of the Constitution of the United States.

Now, the attorneys for the Respondent in the courts below worked out an ingenious scheme to circumvent a default judgment and a sham answer that denied the evidence appended hereto at (A-1 to A-11) in support of petitioner's complaint, filed in Transcript of Record pages 1 to 7.

That on January 20, 1960 at a hearing before the Honorable Judge Mortimer Byers of the District Court for a default judgment against the Respondent,

Judge Byers precluded and denied the Government's defense invoked at said hearing under Section 705 U. S. C. A. 38. The Court held the Respondent *answerable* for the charges of the violation of petitioner's rights that were forfeited by the Board of Veterans' Appeals. (Heretofore, under a different cause of action, Judge Byers precluded judicial review under Section 705, in *Di Silvestro* v. *United States Veterans Administration*, 151 F. Supp. 337, certiorari denied 355 U. S. 935.) Judge Byers referred the petitioner's motion for default judgment to the Honorable Judge John R. Bartels, who on February 15, 1960, decided, to wit:

> "Motion by plaintiff for default judgment. Heretofore a motion was made ex parte, for an extension of time to answer, and answer only. However, no order having been submitted on the motion the Court itself, in its own handwriting, wrote out an order adding the words 'or move' without any intention of enlarging the relief requested. Plaintiff then moved to reduce the time granted from 60 to 30 days. This motion was granted, the Court thereupon conforming the order to the defendant's motion papers by deleting the words 'or move'. After lapse of thirty days extension, *defendant nevertheless has refused to answer* but instead has moved against the complaint within the said 30 days in spite of the order. Plaintiff's motion is hereby granted unless defendant files and serves its answer within 20 days hereof, in which event it is denied. This is an order"
>
> /s JOHN R. BARTELS
> U. S. D. J.

(certified record, pages 63-64). (Italics added.)

After the answer was filed and served, Judg. Rayfiel refused to review the joinder of issues and refused to review the truthfulness of an unverified answer, and precluded judicial review of all pleas submitted by the petitioner. Judge Rayfiel further without judicial review of the pleadings rendered his opinion solely upon a prejudicial review of the complaint, *without trial of the issues.* It is asserted that such action of the lower court is in direct violation of the due process of law guaranteed to the petitioner under the Fifth Amendment. It must hold that the lower courts erred and failed to uphold petitioner's rights to the "equal protection under the law."

Further, the opinion concluded at (A-14, 2nd paragraph), to wit:

> "the correspondence attached to the moving papers . . . appears . . . plaintiff is charging the administration with libel . . . section 2680(h) of Title 28 U. S. Code *excepts* a claim arising out of libel."

Here, again, the lower court without judicial review of the answer concludes solely upon correspondence attached to the affidavit of the moving papers submitted in behalf of the Respondent by its attorneys as a devious and ingenious scheme to deprive petitioner of a default judgment and to circumvent a *sham answer* and the trial of the pleadings. In support thereof, the lower courts erred in opinion, because it lacks a trial of the exception of libel, viz:

> "A hearing on an exception of libel must be determined on the pleadings and *an affidavit on*

behalf of the respondents cannot be considered." *Prince Steamship Co.* v. *Lehman*, D. C. N. Y., 1899, 39 F. 704, 5 L. R. A. 464. (Italics added.)

Moreover, petitioner is not charging the administration with libel, *but with the negligent treatment of his war service-connected disability in violation of his rights under Executive Order No. 6566.*

The lower courts in opinion relied upon the following cases to preclude judicial review under Section 705 U. S. C. A. 38, viz:

Di Silvestro v. *U. S. Veterans Administration*, 132 F. Supp. 692, aff. 228 F. 2d 516, cert. denied 350 U. S. 1009;

Di Silvestro v. *U. S. Veterans Administration*, 151 F. Supp. 337, cert. denied 355 U. S. 935 (1959). (In this latter case, Judge Byers precluded judicial review.)

Now, in the case at bar, both Judge Byers and Judge Bartels held the Respondent answerable for its acts and omissions. *Here, in the case at bar, Judge Byers precluded the Respondent from invoking Section 705 to bar jurisdiction and judicial review.* The opinion of the lower courts are in conflict with the action now taken by Judge Byers. It must hold that the lower courts' opinion is not based on fact or law because it avoids judicial review of the pleadings. *There can be no determination of the law without first a determination of the facts.* This the lower courts have erred and failed to do which is commanded under the due process and equal protection of the law!

The evidence of record in the lower court at pages 53 and 108 proves conclusively that the officers, including the officers of the Board of Veterans' Appeals acting for the Administrator of Veterans' Affairs, in violation of regulations and law, *retroactively applied a fraud statute under Section 15, Public Law 2, 73d Congress*, forfeiting petitioner's rights retroactively, viz:

> "VA Regulation 2907(A) . . . Board of Veterans Appeals . . ."
>
> "VA Regulation 2907(B) In view of the drastic nature of the provisions for forfeiture prescribed by . . . Section 15, Public Law 2, 73d Congress . . . it is the duty of the officials designated in VA Regulation 2907(A) . . . Board of Veterans Appeals . . . in connection with the foregoing . . . statutes relating to fraud are without retroactive application" (filed in the Transcript of Record page 81; also see A-18).
>
> "The Board of Veterans' Appeals shall in its decisions be bound by the regulations of the Veterans' Administration, instructions of the Administrator of Veterans' Affairs." Executive Order No. 6230, Veterans Regulation No. 2(a), Part II, Subdivision II, Public Law 2, 73d Congress, Section 9 (709 U. S. C. A. 38); 38 U. S. C. ch. 12, Veterans Regulation.
>
> "Regulations prescribed by the Administrator of Veterans' Affairs which are authorized by statute have the force and effect of law." *Brown v. United States*, 102 F. Supp. 132 (S. D. 799 aff. Fed. 2d 263).

> "The determination of fraud upon which the Administrator of Veterans' Affairs *acts retroactively* in case of fraud . . . is not a conclusive nature. Facts found by the Administrator does not carry with it the conclusiveness of taking it away retroactively." *Hines* v. *United States ex rel. Marsh*, 1939, 105 F. 2d App. D. C.; World War Veterans Act 1924, Section 5,504, as amended, 38 U. S. C. A. Sections 426, 555, which corresponds with . . . *Section 15, Public Law 2, 73d Congress* (715 U. S. C. A. 38). (Italics added.)

No, it cannot hold that Section 705 is an open door sesame to preclude judicial review or deny the petitioner the right to maintain an action for the negligent treatment of his war service-connected disability.

The petitioner contends that the opinion of the lower courts is contrary to law and fact and the lower courts' decisions are in conflict with the decisions of the United States Court of Appeals for the District of Columbia and with decisions of this Court. The petitioner predicates upon the foregoing and the following authorities and law, in support of his petition for a writ of certiorari, that fall squarely in point with the case at bar, to wit:

> "Under any act administered by the Veterans' Administration . . . did not preclude judicial review by the Administrator working forfeiture of an already adjudicated award of benefits." *Wellman* v. *Whittier*, C. A. D. C. 1958, 259 F. 123.

In the *Wellman* case mentioned above, the Court of Appeals for the District of Columbia, with more

than twenty years of actual adjudication of veterans' cases, rendered a ruling which is directly in point with the petitioner's case at bar.. It was decided in the *Wellman* case, to wit:

> "While statutes pertaining to forfeiture of Veterans' benefits authorizes a determination, by the Administrator upon evidence satisfactory to him, and if it depends upon erroneous interpretation of the law, it may be subject to judicial review . . . He may not deny a right the statute created. See: Dismuke v. United States, 1936, 297 U. S. 167, 172, 56 S. Ct. 400, 90 L. Ed. 561 . . .
>
> the Administrator argued the preclusion of judicial review; which has been the argument of the defendant in the case at bar to preclude judicial review under section 705; it was argued by the Administrator that if '38 U. S. C. A. section 705 does not apply here he may stand upon 38 U. S. C. A. 11a-2, which reads:
>
> 'Notwithstanding any other provisions of law of this . . . title the decisions of the Administrator of Veterans Affairs on any question of law and fact concerning a *claim* for benefits or payments under any act administered by the Veterans' Administration shall be final and conclusive . . . (underscoring supplied) . . . it be noted Congress accorded finality to decision properly completed and executed VA Form 8-526 * * * constitutes benefits *concerning claims*, a term which is thoroughly understood and carefully defined.'
>
> We have repeatedly recognized that non-reviewability must be accorded to the Administrator's

decisions as to claims. See: Longernecker v. Higley, 1955, 97 U. S. D. C. 144, 229 F. 2d 27 and see Jaffe, The Right to Judicial Review II, 71 Harv. L. Rev. 770 (1958) . . .

But here we are not concerned with a 'claim' by a veteran, but with action by the Administrator working a forfeiture of an already adjudicated award to benefits." *Wellman* v. *Whittier*, C. A. D. C. 1958, 259 F. 2d 123, petition for rehearing denied September 12, 1958. (Italics added.)

Judge Rayfiel and the Court of Appeals for the Second Circuit entirely ignored the precedent established in *Wellman* v. *Whittier*, supra.

The courts below entirely ignored petitioner's evidence appended hereto at (A-1 to A-11) and completely ignored that petitioner has an already adjudicated award to all benefits, properly completed upon an executed VA Form 8-526 in custody of the Veterans' Administration, under C = 4 780 118, bearing the petitioner's name.

The actions taken by the lower courts is in clear violation of the petitioner's rights. And that the Respondent's employees under the supervision of a different Administrator of Veterans' Affairs has taken away a right created under Executive Order No. 6566, awarding petitioner medical and hospital care and treatment, which "he may not deny a right the statute created." *Dismuke* v. *United States*, 297 U. S. 167, 56 S. Ct. 400, 90 L. Ed. 581, supra in brief.

The petitioner is seeking redress for his grievances and for the right to maintain an action against the

United States, under the Federal Tort Claims Act created under Section 1346(b) thereof, for the negligent treatment of his war service-connected disability, in accordance with the ruling of this Court, that was completely ignored by the lower courts, to wit:

> "A veteran might maintain an action against the United States for an injury suffered . . . as result of negligent treatment of a service-connected disability." *United States* v. *Brown*, 348 U. S. 111, 75 S. Ct. 141 (1954).

For the foregoing reasons the petition for a writ of certiorari should be granted.

WHEREFORE, the petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this cause, directed to the United States Court of Appeals for the Second Circuit, that upon such review that the decision and judgment of that court be vacated and set aside, and this cause remanded to the said Court of Appeals in accordance with the views of this Court.

JOSEPH W. DI SILVESTRO
41-11 12th Street
Long Island City 1, N. Y.
Attorney for Petitioner

Affidavit of Administrator of Veterans' Affairs

State of Massachusetts,
County of —ss.:

TO WHOM IT MAY CONCERN:

WILLIAM F. GREENE, residing at, 29 Adare Place, Northampton, Massachusetts, being duly sworn, deposes and says:

I was the Adjudication Officer, Veterans Administration, New York Regional Office, 252 Seventh Avenue, New York 1, N. Y., who executed pursuant to sections 705 and 708 of Title 38 U. S. C. A., the compensation award under all provisions of Title I, Public Law No. 2, 73d Congress, that awarded Joseph W. Di Silvestro Compensation entitling him to benefits that flow therefrom, and,

I identify the attached photostatic copy of Veterans Administration form 50-a, as the true copy of original letter of Award of Disability Compensation or Pension awarded to Joseph W. Di Silvestro, case No. C-4 780 118, dated February 20, 1948, bearing my signature which represents under the authority stated above as the final and conclusive decision of the Administrator of Veterans' Affairs, and,

I also direct the attention to whom it may concern, that the appeal paragraph of the photostatic copy VA form 50-a as mentioned above, states that, "If you are dissatisfied with the findings, etc." . . . places Joseph W. Di Silvestro, the veteran on notice of his right to appeal from the decision and

Affidavit of Administrator of Veterans' Affairs

Inasmuch as Joseph W. Di Silvestro did not exercise the right of appeal of the Compensation disability awarded him under letter dated February 20, 1948 (photostat attached hereto) the decision is final, and,

Any further claims instituted by the veteran Joseph W. Di Silvestro, cannot come within the purview of Chapter 12, title 38 U. S. C. A., but are, only subject to future ratings as provided in the manner set forth in Rating Schedules as the regulations of the Veterans Administration, provide in the matter of permanency, and,

I, in conclusion make the comment that there exists a final compensation decision as shown by the attached photostatic decision legally and properly established by the Administrator of Veterans' Affairs, under his final decision that I executed in accordance with the law mentioned hereinabove, the veteran is entitled to the permanency of rating under any administration of veterans' entitlement, privilege and rights.

/s/ WILLIAM F. GREENE
William F. Greene
Affiant

Sworn to before me this
November, 1955

.....

(Filed in transcript of record pages 80, 157, 158.)

Compensation Disability Award

Veterans Administration
Form F-50a-Rev. Oct. 1945

File No. C- 4 780 118
NK8BA

AWARD OF DISABILITY COMPENSATION OR PENSION
(SERVICE CONNECTED)

February 20, 1948

To: Mr. Joseph W. DiSilvestro
105-12—76th Street
Ozone Park, New York

Dear Mr. DiSilvestro:

In accordance with the provisions of Public Law 2- 73d Congress as amended you are hereby notified as a Veteran bearing S# 32 879 249 who was discharged from the Military service of the United States on the 17th day of November 1944, you are awarded Compensation in the amount of $13.80 per month from October 10, 1946, on account of disability resulting conditions held to have been incurred or aggravated during your War Service Nervous Condition

The monthly payments to this award will continue during the period which you are 10% disabled subject to the general conditions mentioned on the reverse side of this communication to which your attention is directed. Upon the happening of any of the contingencies mentioned the Veterans Administration should be notified promptly.

It has been determined that service connection is

Compensation Disability Award

not shown for the following conditions Feet, Tonsilitis Chronic, Larngitis, Chronic, Chest and Head Pain, Pneumonia, Heart? Sinusitis, Lung. Your nose condition is not considered a disability within the meaning of the compensation law.

If you are dissatisfied with the findings of the Veterans Administration or the amount of this award it is your privilege to enter an appeal therefrom within 1 year from the date of this communication. Such appeal should be submitted to this office for certification to the Board of Veterans' Appeals, Washington, D. C. . . .

/s/ W. F. GREENE
W. F. GREENE, Adjudication Officer, 252 Seventh Avenue, New York 1, N. Y.
Veterans Administration

(see other side)[1]

[1] Notice: . . .

Whenever in need of hospital treatment for disease or injury, regardless of service origin, out-patient treatment or supplies in connection with a service-incurred or aggravated disability, or domiciliary care, application may be made to the nearest office of the Veterans Administration, preferably the one having custody of your disability pension records, for determination of entitlement and medical need . . .

(Filed in transcript of record pages 80 and 158.)

Forfeiture Letter

Seal: Veterans Administration
1930

VETERANS ADMINISTRATION
REGIONAL OFFICE
252 Seventh Avenue
New York 1, New York

Your File Reference:

In reply, refer to:
30006-136[37
C 4 780 118

October 8, 1959

Mr. Joseph W. Di Silvestro
41-11 12th Street
Long Island City 1, N. Y.

Dear Mr. Di Silvestro:

We are replying to your request of September 30, 1959 for treatment at this clinic.

The treatment requested cannot be given because we are informed that you have forfeited all rights, claims and benefits to which you might otherwise be entitled under laws administered by the Veterans Administration.

The Veterans Administration Board of Veterans Appeals, Washington, D. C. confirmed this action in their decision of January 7th, 1957.

Very truly yours,

s/ FELICE PEPE
FELICE PEPE
Chief, Medical Administration
Division

(Filed in transcript of record page 83.)

Statement of Dr. Harry G. Golan

Harry G. Golan, M.D. F.A.C.P.

119-05—80th Road
Kew Gardens 15, N. Y.

Jan 27, 1960

To the Justice of U. S. District Court:

Dear Sir:

Mr. Joseph Di Silvestro suffers from episodes of Angina Pectoris.

Any undue tension, physically, mental or emotional precipitates and aggravates his condition.

Very truly yours

/s/ Harry G. Golan M.D.

(Filed in transcript of record page 79.)

Decision of Veterans Administration

Seal: VA
1930

VETERANS ADMINISTRATION
NEW YORK REGIONAL OFFICE
252 Seventh Avenue, New York 1, N. Y.

Mr. Joseph W. Di Silvestro C-4 780 118
105-12 76th Street
Ozone Park 17, New York

Dear Sir:

Your claim for disability compensation has been reviewed under all applicable laws on the basis of all evidence of record. The results of the review are indicated in the paragraphs checked below:

(X) The rating of your service connected disability of which you were previously informed is confirmed and continued.

(X) The statement of Dr. Harry G. Golan, dated May 26, 1948 and your letter of June 1, 1948 have been considered on this review (OVER)* and it has been determined that the evidence presented does not warrant any change in the prior decision of your claim.

* It has been held, upon all facts of your case, that a compensable evaluation for your nervous condition was properly payable only from October 10, 1946, date of receipt of the statement of Dr. Golan establishing such evaluation. . . .

Very truly yours,

/s/ W. F. GREENE
W. F. Greene
Adjudication Officer

(Filed in transcript of record page 159.)

Affidavit of American Legion

Seal: American Legion

Jamaica 6-7001:

AMERICAN LEGION SERVICE COMMITTEE
QUEENS COUNTY
161-01 Hillside Avenue
Jamaica 32, N. Y.

Michael J. Oppelt, Service Director

To:

The Honorable United States District Judge
Eastern District of New York

RE: Di Silvestro v. U. S. of America
Civil Action 20188

AFFIDAVIT

State of New York,
Queens County—ss.:

I MICHAEL J. OPPELT, being duly sworn deposes and says:

That I am the Service Director of the Queens County American Legion, and I am familiar with laws governing Veterans for over 40 years, and as such I am a legal recognized representative before the Veterans Administration.

That there exists in the files of the Veterans Administration a power of attorney executed by Mr. Di Silvestro empowering me as his legal representative before the VA.

Affidavit of American Legion

That as the legal representative of Mr. Di Silvestro before the VA, I have had the opportunity to examine the confidential files of the VA concerning Mr. Di Silvestro, under a case folder number C-4 780 118 bearing his name.

That upon previous examinations of the said confidential files I have found that the record discloses that Mr. Di Silvestro under final and conclusive decision of the Administrator of Veterans' Affairs by William F. Greene, holds Mr. Di Silvestro to be an honorably discharged W.W. II, veteran having a mental disability of service origin.

That the aforesaid VA records further disclose that pursuant to title I, of Public Law 2, 73d Congress, he has an award of compensatory benefits established by VA medical authority.

That upon previous examinations of above mentioned confidential files, the said files show no Administrators' decisions ever rendered against the honorable discharged veteran, Mr. Di Silvestro, pursuant to any designated provisions of sections 701 to 721 of title 38, consecutively.

That all decisions rendered by the VA in the said files concerning Mr. Di Silvestro are invoked under title I, of Public Law 2, 73d Congress.

That upon previous examinations of the above mentioned confidential files of the VA, the files disclose statement of one Mr. Robert Case and one Mr. Nathan Knapp upon which statements the VA's Board of Veterans Appeals relied upon to forfeit Mr. Di Silvestro's rights and entitlements upon the ex parte statements of the said Mr. Case and Mr. Knapp under the provisions of Section 15, Public Law 2, 73d Congress.

Affidavit of American Legion

That upon the examination of the said Veterans Administration files, I found that Mr. Case and Mr. Knapp mentioned above are not employees of the VA and the VA disclosed confidential army records and papers to them, which by law under Executive Order 6099 is prohibited.

That upon further examination of the said VA files, discloses no authorized Presidential or Congressional law or regulation authorizing the VA or its employees to administer, execute or enforce the provisions of Section 15 of title I, Public Law 2, 73d Congress, as required by law pursuant to sections 7, 8 and 20 of title I, Public Law 2, 73d Congress.

That I have made an extensive investigation and have found for Mr. Di Silvestro and the American Legion, that Mr. Di Silvestro has not violated or transgressed any and all parts of Section 15, title I, Public Law 2, 73d Congress, and the VA has forfeited Mr. Di Silvestro the right of Administrative review, on February 6, 1957 and thereafter.

That Mr. Di Silvestro has been refused medical care and attention and hospitalization, is in violation of his right to such need at any time he applies for such medical care, by law of Executive Order No. 6566.

That on December 8, 1955, I was present at the hearing held at the United States Court for the Second Circuit of Appeals, in the case of Di Silvestro v. Veterans Administration, presiding Justices Swan, Frank and Lumbard, upon oral motion and argument presented by Mr. Di Silvestro in his own behalf, the court per curiam struck from the VA's brief all matter pertaining to Section 15, Title I, of Public Law 2, 73d Congress, under law read from the law book

to the Court by Mr. Di Silvestro, that under section 7 of Title I of Public Law 2, 73d Congress, required The President's and Congress' approval for the administration, execution and enforcement of section 15 and under other provisions of title I, of Public Law 2, 73d Congress,

This affidavit is executed in the interest of justice to the honorable discharged disabled war veteran, Mr. Di Silvestro.

/s/ MICHAEL J. OPPELT
Michael J. Oppelt
Affiant

Sworn to before me this
23rd day of March, 1960.

/s/ Jane Jarvis
Notary Public
City and State of N. Y.
Qualified in Queens County
Term exp Mar 31, 1960.

(Filed in transcript of record pages 144, 145).

Opinion of District Court

Filed March 21, 1960
in *Di Silvestro v. U. S. of America*
Civ. 20188 U. S. D. C., E. D. N. Y.

. . .

RAYFIEL, J.

These are cross motions. The defendant moves for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the plaintiff cross-moves for judgment on the pleadings pursuant to Rule 12.

The complaint herein is entitled "Complaint for Negligence Under the Federal Tort Claims Act" and contains five causes of action: Each cause of action is based on Section 1346(b) of Title 28, United States Code, and the complaint demands damages in the aggregate sum of $2,000,000.

This is the latest in a series of actions commenced by this plaintiff over the past several years in which he has sought to have certain rights to pension and disability benefits restored to him after they had been forfeited by the Veterans' Administration. These actions were *DiSilvestro* v. *United States Veterans' Administration*, 132 F. Supp. 692, affirmed 228 F. 2d 516; cert. denied 350 U. S. 1009; rehearing denied 351 U. S. 928; and *DiSilvestro* v. *United States Veterans' Administration*, 151 F. Supp. 337; application to appeal in forma pauperis denied November 7, 1958; certiorari denied 355 U. S. 935; rehearing denied 355 U. S. 968. In these cases my colleagues, Judge Galston and Judge Byers, held that this Court had no jurisdiction to review the action of the Veterans' Ad-

ministration since Section 705 of Title 38, United States Code, provided that "All decisions rendered by the Administrator of Veterans' Affairs under the provisions of Sections 701, 702, 703, 704, 705, 706, 707-710, 712-715, 717, 718, 720 and 721 of this title or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision." This Section has been replaced by Section 211 of Title 38 which provides as follows: "(a) Except as provided in Sections 784, 1661, 1761, and as to matters arising under Chapter 37 of this title, the decisions of the administrator on any question of law or fact concerning a claim for benefits under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision."

In the instant case the plaintiff's first and fifth causes of action seek damages for the alleged wrongful deprivation of his pension and disability rights by employees of the Veterans' Administration. The second cause of action seeks damages for the alleged wrongful disclosure of confidential and privileged documents and papers which were in the plaintiff's file in the Veterans' Administration to certain unauthorized persons, from whom the employees then obtained statements and affidavits on which it based its forfeiture on the benefits to which the plaintiff claims he was entitled.

Although the plaintiff asserts that these claims are based on the Federal Tort Claims Act, and are os-

tensibly for damages, this is, in reality, another attempt to obtain a review of the decision of the Veterans' Administration which forfeited his pension and disability benefits. Both Judge Galston and Judge Byers have held, and their decisions have been affirmed, that this court has no jurisdiction to grant the plaintiff such a review. It cannot now be granted in the guise of an action brought under the Federal Tort Claims Act. The defendant's motion for summary judgment is granted as to the first, second and fifth causes of action.

The third and fourth causes of action are for damages for the alleged wrongful disclosure by employees of the Veterans' Administration to United States Senators Jacob K. Javits and Kenneth B. Keating of certain confidential and privileged information. The correspondence attached to the moving papers reveals that the *plaintiff* requested the Senators to intercede in his behalf. In accordance with *his* request they each wrote to the Veterans' Administration which replied to them. It informed them of the proceedings which had taken place and the actions which had been brought by the plaintiff. There was nothing in the Administration's replies which was either privileged or confidential. All of the matters referred to therein had been litigated by the plaintiff, and had been adverted to in the decisions rendered in the aforementioned court proceedings.

In addition, there is an allegation in the fourth cause of action to the effect that the information given the Senators by the Veterans' Administration was false, and was known to be false. It appears then, that the plaintiff is charging the Administration with

libel. This he may not do since Section 2680(h) of Title 28, U. S. Code, specifically excepts a claim arising out of libel from the provisions of section 1346(b) of said Title 28. In my opinion there is no genuine issue as to any material fact herein. Accordingly, the defendant's motion for summary judgment is granted and the plaintiff's motion is denied.

Settle order on notice.

Dated: March 21, 1969

s/ LEO F. RAYFIEL
United States District Judge

. . . . . .

(Filed in transcript of record pages 116 to 120.)

Judgment Appealed From

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOSEPH W. DI SILVESTRO,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Motion for reargument and reconsideration of appellant's Appeal; that appellant be heard orally; vacating and setting aside the order of this court affirming the opinion of Judge Rayfiel; remanding the case to the lower court for judicial review of government officers and employees negligence and for damages.

Motion denied.

Signed by:

J. E. LUMBARD
C. E. CLARK
H. J. FRIENDLY
U. S. C. JJ.

Jun 15 1960

Filed Jun 15, 1960

FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 12 19
JAMES R. BROWNING, Clerk

No. 256

In the Supreme Court of the United States

OCTOBER TERM, 1960

JOSEPH W. DI SILVESTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEO. S. LEONARD,
Acting Assistant Attorney General,
ALAN S. ROSENTHAL,
Attorney,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 256

JOSEPH W. DI SILVESTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Eastern District of New York (Pet. App. A, pp. 12–15) is reported at 181 F. Supp. 860. The Court of Appeals for the Second Circuit affirmed on the opinion of the District Court (Pet., p. 1; Pet. App. A, p. 16).

JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1960. A timely-filed petition for rehearing was denied on June 15, 1960. The petition for a writ of certiorari was filed on July 22, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, by bringing an action against the United States under the Federal Tort Claims Act, is entitled to obtain judicial review of the decision of the Administrator of Veterans' Affairs forfeiting petitioner's benefits and pension rights, when Section 211 of Title 38 of the United States Code expressly provides that the decision of the Administrator is to be final.

2. Whether petitioner is entitled to damages for the release of information by the Veterans' Administration, with respect to the actions and proceedings instituted by petitioner, to two members of the United States Senate whom petitioner had requested to intervene in his behalf.

3. Whether 28 U.S.C. 2680(h) bars an action for libel against the United States under the Tort Claims Act.

STATUTES INVOLVED

1. 38 U.S.C. 211 (formerly 38 U.S.C. (1952 ed.) 705) provides, in relevant part, as follows:

> *Decisions by Administrator; opinions of Attorney General.* (a) Except as provided in sections 784, 1661, 1761, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision.

* * * * *

2. 28 U.S.C. 2680 provides, in relevant part, as follows:

> *Exceptions.* The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> * * * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.
>
> * * * * *

STATEMENT

This is another attempt by this petitioner to obtain judicial review of the action of the Administrator of Veterans' Affairs in forfeiting certain benefits and pension rights on the ground of fraud. In a number of prior actions brought by petitioner it has been held that such review is foreclosed by 38 U.S.C. 211, *supra*, p. 2 (formerly 38 U.S.C. (1952 ed.) 705). See *Di Silvestro* v. *United States Veterans' Administration*, 81 F. Supp. 844 (E.D.N.Y.), affirmed, 173 F. 2d 933 (C.A. 2); *Di Silvestro* v. *United States Veterans' Administration*, 9 F.R.D. 435 (E.D.N.Y.);

Di Silvestro v. *United States Veterans' Administration*, 10 F.R.D. 20 (E.D.N.Y.), affirmed, 181 F. 2d 502 (C.A. 2), certiorari denied, 339 U.S. 989; *Di Silvestro* v. *Gray*, 194 F. 2d 355 (C.A.D.C.), certiorari denied, 343 U.S. 930; *Di Silvestro* v. *United States Veterans' Administration*, 132 F. Supp. 692 (E.D.N.Y.), affirmed, 228 F. 2d 516 (C.A. 2), certiorari denied, 350 U.S. 1009, rehearing denied, 351 U.S. 928; *Di Silvestro* v. *United States Veterans' Administration*, 151 F. Supp. 337 (E.D.N.Y.), application for leave to appeal in forma pauperis denied November 7, 1958, certiorari denied, 355 U.S. 935, rehearing denied, 355 U.S. 968. In the present case, petitioner seeks to invoke the Tort Claims Act as a basis for litigating his controversy with the Administrator.

Two of the counts in petitioner's complaint asserted in substance that the Administrator's decision pertaining to his pension and disability rights was wrongful and amounted to negligence *per se* (Pet. App. A, p. 13). A third count claimed that there had been a wrongful disclosure of confidential and privileged documents in petitioner's Veterans' Administration file and that the unauthorized recipients of the documents had furnished the information upon which the administrative decision was based (Pet. App. A, p. 13). The remaining two counts alleged a wrongful disclosure of confidential and privileged information to Senators Javits and Keating and charged that some of the information so supplied was false (Pet. App. A, p. 14). Damages were sought in the amount of $2,000,000.

The District Court granted summary judgment to the United States. It held that, apart from the counts pertaining to information purportedly supplied to the Senators, the complaint represented an impermissible endeavor to avoid the effect of the rulings in the earlier suits brought by petitioner that 38 U.S.C. 211, *supra*, p. 2, precludes judicial review of the Administrator's action in forfeiting his veteran's benefits for fraud (Pet. App. A, pp. 13–14). In the court's view, Section 211 cannot be circumvented by the filing of an action under the Tort Claims Act. With respect to the other counts, the court found that petitioner had requested Senators Javits and Keating to intercede on his behalf and that, since the information was only as to the proceedings which had taken place, there was nothing of a confidential or privileged nature released (Pet. App. A, p. 14). Further, the court determined that it could not consider the allegation that certain of the supplied information was false, in view of 28 U.S.C. 2680(h), *supra*, p. 3, which excepts from the ambit of the Tort Claims Act "claims arising out of * * * libel" (Pet. App. A, pp. 14–15). The Court of Appeals affirmed on the opinion of the District Court (Pet., p. 1).

ARGUMENT

Petitioner once again seeks to obtain judicial review of the action of the Administrator of Veterans' Affairs in forfeiting his veteran's benefits for fraud. All of his prior actions were dismissed on the ground that, by reason of 38 U.S.C. 211 (formerly 38 U.S.C. (1952 ed.) 705), *supra*, p. 2, the Administrator's

decision was "final and conclusive" and not subject to review by "any court of the United States." To avoid the force of this clear Congressional mandate, petitioner now looks to the Tort Claims Act as a basis for relief. But, as both courts below held, that Act does not confer jurisdiction to review determinations which Congress has expressly declared that no court shall have "power or jurisdiction" to review. Moreover, the claim is barred by the provisions of 28 U.S.C. 2680(a), *supra*, p. 3, which exclude from the coverage of the Tort Claims Act any claim based upon the exercise of a discretionary function.

The courts below also were clearly correct in ruling that there was nothing in the information disclosed to Senators Javits and Keating which was privileged or confidential. Petitioner had requested the Senators to intervene on his behalf and the District Court found that they were only supplied with information as to the actions brought by petitioner and the proceedings which resulted. Certainly such information, being public in nature, bore no privilege. Further, the count alleging that the Veterans' Administration knowingly released untrue and false information to Senators Javits and Keating is barred by 28 U.S.C. 2680(h), *supra*, p. 3, which excepts from the Tort Claims Act claims arising out of libel.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEO. S. LEONARD,
Acting Assistant Attorney General.

ALAN S. ROSENTHAL,
Attorney.

AUGUST 1960.

In the

Supreme Court of the United States

October Term, 1960

No. 256

Joseph W. Di Silvestro,

Petitioner,

—v.—

United States of America,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Joseph W. Di Silvestro
41-41 12th Street
Long Island City 1, N. Y.
Attorney for the Petitioner

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Statement 1

POINT I

Congress expressly declared whether a statute or regulation be valid or invalid, or based upon the exercise or perform a discretionary function or duty on the part of a Federal Agency or employee of the Government, "the exercise of due care is 'required'". See: 2680(a) U. S. C. A. 28 3

POINT II

Denial of judicial review is in violation of the due process of law under the Fifth Amendment of the Constitution of the United States. See: *Welbman* v. *Whittier*, in Pet. Brief, pp. 15 and 17 3

POINT III

Congress has expressly declared that the United States District Court 'shall have exclusive jurisdiction to hear, determine and render judgment against the United States for money for personal injury caused by negligence. See: Sec. 1346(b) U. S. C. A. 28, and *United States* v. *Brown* in Pet. Brief, pp. 3, 9, and 18 3

POINT IV

The Administrator of Veterans' Affairs, Board of Veterans' Appeals, and all other officers and employees of the Veterans Administration are not immune from judicial review or excluded from the provisions of Section 1346(b) U. S. C. A. 28 4

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IN THE

Supreme Court of the United States

October Term, 1960

No. 256

JOSEPH W. DI SILVESTRO,

Petitioner.

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Statement

Upon a perusal of the cases relied upon by both the Respondent and the lower courts, this Court's attention is directed to the fact, that in the cases of *Di Silvestro* v. *Gray*, 194 F. 2d 355, certiorari denied, 343 U. S. 930; *Di Silvestro* v. *U. S. Veterans Administration*, 81 F. Supp. 844, affirmed, 173 F. 2d 933 (C. A. 2); *Di Silvestro* v. *U. S. Veterans Administration*, 9 F. R. D. 435; *Di Silvestro* v. *U. S. Veterans Administration*, 10 F. R. D. 20, affirmed, 181 F. 2d 502 (C. A. 2), certiorari denied, 339 U. S. 989; *Di Silvestro* v. *U. S. Veterans Administration*, 132 F. Supp. 692, affirmed, 228 F. 2d 516, certiorari denied, 350 U. S. 1009; *Di Silvestro* v. *U. S. Veterans Administration*, 151 F. Supp. 337, certiorari denied, 355 U. S. 935; the petitioner was precluded from judicial review of *Decisions*

rendered by the Administrator and not of *Acts* of the Administrator working forfeiture of an already adjudicated award to Medical and Hospital Benefits. The petitioner in the above cited cases, did not seek judicial review of Acts of the Administrator forfeiting petitioner's veteran's rights to Medical and Hospital care for *fraud. There was no fraud committed by the petitioner.* See: American Legion's Affidavit in support thereof, on pp. A-8 to A-11 of Petitioner's App.

The case at bar was instituted as the result of Respondent's negligent treatment of petitioner's war service-connected disability, which appears fully in Pet. Brief, pp. 4 to 6. This Court's attention is directed to the fact that the petitioner *for the First Time* is seeking *Judicial Review* of the Administrator's *wrongful act* working a forfeiture of an already adjudicated award of Medical and Hospital benefits, a property right vested to the petitioner for physical and mental damages incurred in the military service in time of war. In support thereof, see: Pet. App. pp. A-3, A-4. The Administrator is prohibited by ruling of this Court, holding that, "*He may not deny a right the statute created.*" *Dismuke* v. *United States*, 297 U. S. 127, 56 S. Ct. 400, 90 L. Ed. 581. It must hold that petitioner's guarantee under the Fifth Amendment of the Constitution has been violated.

Further, it appears on the last paragraph, p. 6 in Respondent's Brief, the Respondent's attorneys are raising a sham defense of libel as an issue, which was assumed by the lower court, appearing in Pet. App. p. A-15. Here the Respondent asserts a right of privilege to disclose to anyone libelous information under the pretext of "being public in nature". There can be no justification of such action, which is offensive and repugnant to "Our Constitution". Information released to Senators Javits and Keating *served no useful purpose.*

POINT I

Congress expressly declared whether a statute or regulation be valid or invalid, or based upon the exercise or perform a discretionary function or duty on the part of a Federal Agency or employee of the Government, "the exercise of due care is 'required' ". See: 2680(a) U. S. C. A. 28.

Therefore, whether section 2680(h) U. S. C. 28 is excluded from the ambit of 1346(b) U. S. C. 28, is immaterial to the issue in the case at bar which is, to wit:

POINT II

Denial of judicial review is in violation of the due process of law under the Fifth Amendment of the Constitution of the United States. See: *Wellman* v. *Whittier*, in Pet. Brief, pp. 15 and 17.

POINT III

Congress has expressly declared that the United States District Court shall have exclusive jurisdiction to hear, determine and render judgment against the United States for money for personal injury caused by negligence. See: Sec. 1346(b) U. S. C. A. 28, and *United States* v. *Brown* in Pet. Brief, pp. 3, 9, and 18.

This is petitioner's legal right notwithstanding any decisions or opinions to the contrary. This guarantee is inviolate to the petitioner under the First Amendment of the Constitution of the United States.

POINT IV

The Administrator of Veterans' Affairs, Board of Veterans' Appeals, and all other officers and employees of the Veterans Administration are not immune from judicial review or excluded from the provisions of Section 1346(b) U. S. C. A. 28.

"Federal Agency" includes the executive department and independent establishments of the United States—

"Employees of the Government" includes officers or employees of any federal agency. (Section 2671 U. S. C. A. 28 as applied to section 1346(b) U. S. C. A. 28) (Federal Tort Claims Act).

It must hold that Respondent's Brief is without merit both in fact and law, and the cases relied upon by both the Respondent and the lower courts are inapplicable.

CONCLUSION

For the above reasons and for the reasons set forth in Brief of Petitioner, it is respectfully submitted that the writ of certiorari and the relief sought for be granted.

JOSEPH W. DI SILVESTRO
41-11 12th Street
Long Island City 1, N. Y.
Attorney for the Petitioner

August 1960